ant's friend "why he had not settled the case and not allowed the same to come into court:" Rowe *v.* Canney, 139 Mass., 41, or where the unsuccessful party knew of the incompetency of a juror to serve: Sellect *v.* Turnpike Co., 13 Conn., 453; or where a paper was taken out by the jury with the presumed knowledge of the defendant: State *v.* Nichols, 29 Minn., 357; or where a juror, contrary to the express instructions of the Court, which were known to the defendant, accompanied the defendant to his brewery: U. S. *v.* Salentine, 8 Biss. U. S., 404, the several verdicts were set aside. See Pepper *v.* Comm., 15 Pa., 468.

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DEPARTMENT OF EQUITY.

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DUFF *v.* RUSSELL[1] NEW YORK COURT OF APPEALS.

Injunction—Breach of Contract—Personal Services.

Defendant, an actress and singer, had contracted with plaintiff, a theatrical manager, to appear in such operas as he should produce during a certain season. Defendant was distinguished in her profession, and a great artistic acquisition to any theatre producing comic operas. Plaintiff had advertised defendant at great expense as a member of his company. During such season defendant refused to perform in an opera produced by plaintiff and she, at that time, had agreed to appear at a rival theatre to the end of the season. Plaintiff unsuccessfully protested against this. It was not possible for him to replace defendant by any other actress and singer of equal repute; and, in consequence, he was likely to, and in fact did, sustain irreparable damage. *Held*, that these facts were sufficient, *prima facie*, to entitle the plaintiff to an injunction to restrain defendant from appearing at such other theatre. *Held*, also, that as the terms and requirements of the defendant's contract rendered it impossible for her to perform elsewhere without violating her contract, the fact that it did not contain a negative clause binding her not to appear elsewhere, was not ground for refusing plaintiff an injunction.

[1] 14 N. Y. S., 134. Decided June 14, 1892.

Injunction to Restrain the Breach of Contract for Personal Services.

This question of whether or no a court of equity will interfere by injunction to prevent the breach of a contract for personal services is one upon which the authorities have been, up to a comparatively recent date, exceedingly conflicting and irreconcilable. It is settled that equity will not enjoin the violation of a restrictive covenant in an ordinary contract for work and labor, or a contract of employment between an artisan, a laborer, or a clerk and their employer. For the breach of such a contract the complainant must look to his damages at law as his sole redress, and his remedy at law is deemed sufficient.

In Carter *v.* Ferguson, 58 Hun. (N. Y.), 569, it was held that the exercise of this equitable jurisdiction ought always to be limited to cases where the abilities of the defendant are exceptional, so that his place cannot readily be supplied, for it would seem to be only under such circumstances that irreparable damage can be occasioned to the plaintiff. This point is well illustrated in Columbus Ball Club *v.* Riley (Ohio Com. Pl.), 25 Weekly Law Bull., 385, and also in the opinion of the Court in Cort *v.* Lassard and Lucifer, 18 Oreg., at p. 227.

But where the services involve the exercise of powers peculiarly and largely intellectual, as in the case of literary work, or of mental and physical faculties combined, as in dramatic and operatic work, or even of unusual physical powers, as of athletes or gymnasts of special ability, it is difficult and in many cases impossible for a jury to form an adequate estimate of damages. Such services are individual and peculiar, and damages for breach of such contracts are not only difficult to ascertain, but cannot with any certainty be estimated. It has accordingly been finally settled that where the contract provides for special, unique or extraordinary personal services, whether mental or physical, while a court of equity will not attempt to compel affirmative specific performance, since that would be impracticable, yet it will still restrain its violation by injunction, thus operating to bind the parties to a fulfillment of their engagements, at least so far as they can be bound. In Metropolitan Exhibition Co. *v.* Ward, 9 N. Y. S., 779, N.Y. Sup. Ct., 1890, the Court said: "Whatever doubt may have existed in the past, it is now the settled law of England and America that when a person has entered into a definite contract to render services to another of such a nature as not to be easily replaced, and the loss of his services to the employer will be a loss not to be compensated for in damages, a breach or a threatened breach of such contract may be restrained by injunction."

But in such cases the services to be performed must be individual and peculiar because of their special merit or unique character; for otherwise the remedy at law would be adequate.

It was formerly held that inasmuch as equity could not compel performance of the affirmative part of an agreement and oblige the defendant to perform the services agreed to be performed, it would not attempt indirectly to secure this end by enjoining the breach of the contract, and compelling

him to abstain from performing such services for other persons than the plaintiff. The earlier cases upon this subject, such as Kemble *v.* Kean, 6 Simons, 333; Sanqurico *v.* Benedetti, 1 Barbour, 315; Kimberly *v.* Jennings, 6 Simons, 340; Corsetti *v.* Rivafinoli, 4 Paige, 464; Hamblin *v.* Durneford, 2 Edwards, 529, and the Pennsylvania case, Ford *v.* Jermon, 6 Phila., 6, which followed them, would seem to have been ruled upon the theory that because by their nature such contracts do not admit of compulsory specific performance, therefore an injunction should not be granted, inasmuch as that remedy is only a substitute for the other, and could only result in an effort to compel specific performance, which might in the sequel be altogether inefficient to accomplish that result.

The impossibility of securing specific performance of such contracts appears clearly to have been the ground on which the Chancellors in these earlier English and American cases refused to interfere in behalf of the complainant. The doubt expressed by Judge STORY in regard to the force of this reasoning (2 Eq. Jurisp., 7th ed., 958, note 6) has been fully confirmed by the more recent cases, both in England and in this country, and within recent years Kemble *v.* Kean, and all the cases that followed it have been overruled, as well by the English tribunals as by the courts of this country.

As to granting the injunction in the absence of a negative covenant, the remarks of Lord SELBORNE in Wolverhampton, etc. Ry. Co. *v.* London, etc. Ry. Co., L. R. 16 Eq. Cas., 440, are pertinent: "I can only say that I should think it was the safer and better rule to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

Acting upon the rule thus laid down, and coming to the conclusion that the complainants had a substantial equity, Lord SELBORNE assumed jurisdiction, though there was no negative clause, and overruled the defendant's demurrer to the complaint.

The same rule was applied in Montague *v.* Flockton, L. R. 16 Eq. Cas., 189, where it was held that an actor who entered into a contract to perform for a certain period at a particular theatre might be restrained by injunction from performing at any other theatre during the pendency of his engagement, notwithstanding that the contract contained no negative clause restraining the actor from performing elsewhere.

But in Burton *v.* Marshall, 4 Gill. (Md.), 487, upon a contract similar in its provisions to that in Montague *v.* Flockton, it was held that a court of equity could not be asked to engraft upon the affirmative agreement a negative stipulation and restrain its breach by an injunction.

In Butler *v.* Galletti, 21 How. Pr., 465 (1861), under an agreement by the defendant, a danseuse, to dance at the plaintiff's theatre or where he should prescribe, with no negative or restrictive clauses, the plaintiff, on an alleged breach of

the agreement by the defendant, was not granted an injunction restraining the defendant from a violation thereof.

In Hamblin *v.* Dinneford, 2 Edw. Ch. (N. Y.), 529, the agreement to act contained a negative covenant, and the bill sought to compel specific performance, the court said: "The Court can make no such order. The only relief it could give would be to restrain this actor from performing elsewhere than at the Bowery Theatre, and this would leave the positive part of the agreement untouched. The parties must be left to the law."

The reasoning upon which these cases were decided has been overthrown by the later and better sustained authorities, which hold that where a person enters into a contract to render services for a reasonable length of time, a court of equity, although it cannot enforce the affirmative stipulation by compelling him to perform these services, will, nevertheless, interfere to restrain the violation of the negative stipulation by enjoining him from giving to a third person the services he has bound himself to render to another.

It has been argued that this rule does not apply where the contract of service does not contain a negative clause that the party agreeing to render the service will not perform like services for any other person during the time covered by the contract; that is, that he will not break his contract. But this contention has been held to be wholly untenable. Every express promise to do an act embraces within its scope an implied promise not to do anything which will prevent the promisor from doing the act which he has engaged to do. So that by the later decisions relief may be allowed, even though the contract of service or employment contains no negative or restrictive clause, if such a negative element may fairly be implied from the conditions of the contract. Kerr on Injunctions, at p. 521, says: "When the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, a court of equity will import the negative quality and restrain the doing of acts which are inconsistent with the agreement." This principle was applied by WOOD, V. C., in Webster *v.* Dillon, 3 Jur. (N. S.), 432.

In Lumley *v.* Wagner, 1 De G. Mac. & J., 619, the defendant, a public singer, agreed to sing for the plaintiff during three months at his theatre, and during that time not to sing for any one else. Lord Chancellor ST. LEONARDS enjoined her from violating her contract by singing under another manager at the Italian Opera, Covent Garden, London, within the stipulated period. There was in this case a negative stipulation. Lord ST. LEONARDS said: "I am of opinion that if she (the defendant) had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered." Since the case of Lumley *v.* Wagner the modern doctrine has been well established that such cases, being practically without redress at law, are proper subjects for the control of Chancery, and that the power to interfere by the writ of injunction in

such cases ought to be exercised in order to prevent a flagrant breach of good faith for which the suffering party would otherwise be wholly without any adequate means of redress. The argument of Lord ST. LEONARDS would seem to be unanswerable, that when the reason why the Court should not decree specific performance is not that the plaintiff is not entitled to it, but merely the want of means to compel performance, a court of equity ought not upon that ground to refrain from doing what is clearly within its power, viz., to forbid a performance which will violate a contract with another person.

The decision in Lumley *v.* Wagner has accordingly been generally followed both in England and in this country: Waterman on Specific Performance, § 117; Montague *v.* Flockton, L. R., 16 Eq., 189; Stiff *v.* Cassell, 2 Jur. N. S., 348; Fletcher *v.* Montgomery, 23 Beav., 22; Webster *v.* Dillon, 3 Jur. N. S., 432; Rolfe *v.* Rolfe, 15 Sim., 88; Hills *v.* Crall, 2 Phill., 66; Fredricks *v.* Mayer, 13 How. Pr., 566; Hays *v.* Willow, 11 Abb. Pr. N. S., 167; Daly *v.* Smith, 49 How. Pr., 150; McCaull *v.* Braham, 16 Fed. Rep., 37.

In Daly *v.* Smith, where there was an express contract to act, with negative covenants, the Court held that an injunction would lie to restrain from performance at another theatre in violation of the existing contract with the complainant. In McCaull *v.* Braham, 16 Fed. Rep., 37 (1883), an action was brought to restrain Lillian Russell from violating her agreement with the plaintiff by singing elsewhere than at the plaintiff's theatre. The express contract contained a negative covenant. The Court held the case governed by the decision in Daly *v.* Smith, and granted the injunction. Justice BROWNE said: "Contracts for the services of artists or authors of special merit are personal and peculiar, and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity. That violation of such covenants will be restrained by injunction is now the settled law of England." In Ford *v.* Jermon, 6 Phila. Rep., 6 (1885), the agreement to act contained no negative covenant, and the bill sought to enjoin the respondent from playing at any theatre not under the management of the complainant, until the season for which she had agreed to serve him should have expired. The bill was dismissed by the court, Judge HARE holding that inasmuch as the case was not one in which specific performance could be secured, fulfillment of the contract could not be secured by an indirect method of compulsion. In Am. Ass. Base Ball Club *v.* Pickett, *et al.*, 8 Pa. C. C., 232 (1890), it was held that where a person enters into a contract to render services as a base ball player for a reasonable time, a court of equity, although it cannot compel him to perform those services, will nevertheless enjoin him from playing for another person during the time covered by the contract. It is immaterial that the contract does not contain a promise not to perform like services for any other person.

The case of Harrisburg B. B. Club *v.* Athletic Ass., 8 Pa. C. C., 337 (1890), C. P. Dauphin County, SIMONTON, P. J., following the case of Ford *v.* Jermon, and overruling that of Phila. Ball Club *v.* Hallman, held that where a party enters into a contract to render services as a baseball player, a court of equity will not enjoin him from playing with another company during the time covered by the contract.

In Phila. Ball Club *v.* Hallman, 8 Pa., C. C. Rep. 57 (1890), the injunction sought was refused on the ground of unfairness in the agreement, but the dictum of Judge THAYER considers the subject at length, and holds that an injunction will lie, even in the absence of a negative covenant.

"Upon this point of the case I may remark that whatever differences may at a former period have existed upon this subject in the views of different judges and tribunals, and whatever wavering or contradiction may be apparent in the earlier cases, in the administration of this branch of equity jurisprudence we are of opinion that at the present time no doubt can exist that it is a part of the proper jurisdiction of every court of equity to enjoin a person who has covenanted or agreed to render personal services of a particular kind for a definite period of time, exclusively to another party, for a valuable consideration, against a breach of his engagement in cases which will inflict a loss upon the other party for which he can have no adequate remedy at law, and inasmuch as it is practically impossible for courts, armed with even the largest authority, to compel the specific performance of such contracts, they will nevertheless compel their performance as far as lies in their power by restraining a defendant under such circumstances from giving to another the services which he has engaged to give exclusively to the party with whom he has contracted."

Another late case is that of Pratt *v.* Montegriffo, 10 N. Y. S., 903, decided in 1890. This was an action by Charles H. Pratt, manager of the Emma Abbott Grand Opera Company, against Agostino Montegriffo. The defendant appealed from an order continuing a preliminary injunction restraining him from violating his contract with plaintiff. DANIELS, J., said, referring to the early English and American cases opposed to the issuance of such injunctions: "But since these decisions were made the subject has received more deliberate consideration, and the inclination of the courts now appears to be in a decidedly different direction, and the reason of the case supports this inclination. For, while the party cannot be obliged to perform the contract he has entered into by performing the services he has agreed to render, he may yet be restrained from entering the service of a rival company, and rendering services to that company, to the injury and detriment of his employer under the contract; and the only remedy to prevent that is an injunction.

"It is entirely clear that the law can afford no redress by way of damages for the injury which the party entitled to the benefit of the agreement may sustain by the other party's identifying himself with a rival enterprise, and in that manner diminishing the patronage

and profit of the party entitled to the services under the agreement. The only adequate remedy is to prevent the wrong, and that can be no otherwise administered than by an injunction. The defendant is shown to be a person of superior abilities and acquirements in his pursuit of a tenor singer, and his addition to an operatic troupe as one of its members would not fail to be an attraction to the public, and a source of profit to the manager in whose employment he should render his services. The case accordingly does present the right to an injunction under the rules which have been made applicable to the issuing of that order."

In conclusion, the cases upon this subject show that the English courts at first refused to grant such injunctions under any circumstances. Gradually they came to grant relief in cases where an express negative covenant formed part of the agreement. Finally, the modern doctrine has become established in England, that where a contract for personal services is of such a nature that adequate compensation could not be secured by seeking damages in an action at law, its breach may be enjoined by a court of equity, even in the absence of an express negative covenant.

The courts of this country have reached, substantially, the same conclusion after passing through similar preliminary stages, and although there are still to be found, even among modern adjudications, decisions which deny this equitable remedy, the prevailing current of authority sanctions the jurisdiction of equity in such cases.

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TOBIN *v.* THE WESTERN UNION TELEGRAPH COMPANY.[1]
SUPREME COURT OF PENNSYLVANIA.

Telegraph Companies—Limitation of Liability.

The stipulation in the message blank of a telegraph company which provides that the company shall not be liable for any mistakes or delays in the transmission of an unrepeated message, beyond the amount received for sending the same, does not apply to the sendee.

[1] 146 Pa., 375. Decided January 4, 1892.